



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

August 29, 1994

Mr. Charles E. Griffith, III
Deputy City Attorney
City of Austin
P.O. Box 1088
Norwood Tower
Austin, Texas 78767-8828

OR94-506

Dear Mr. Griffith:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act (the "act"). Your request was assigned ID# 24749.

The City of Austin (the "city") has received a request under the act for all proposals responding to two proposal requests: BC3-330 and BC2-259. The city asserts that the proposals are excepted from required public disclosure under sections 552.101, 552.104, and 552.110 of the act.

First, we address the proposals relating to proposal request BC3-330. At the time you requested a ruling from this office, the contract for this proposal request had not yet been awarded. You recently agreed by telephone to verify that this is still the case. To date, we have not heard back from you.

Section 552.101 of the act excepts from required public disclosure information deemed confidential by statute. You suggest that the city must withhold proposals relating to proposal request BC3-330 under section 252.049(b) of the Local Government Code, which provides that before a contract is awarded, "proposals shall be opened in a manner that avoids disclosure of the contents to competing offerors and keeps the proposals secret during negotiations." This language is largely cumulative of section 552.104 of the act which excepts "information that, if released, would give advantage to a competitor or bidder." Section 552.104 is designed to protect the interests of the governmental body in a competitive bidding situation for a contract or benefit. Open

Records Decision No. 592 (1991) at 8. It is not designed to protect the interests of private parties submitting information to a governmental body. *Id.* at 8-9. Once the bidding process has ceased and a contract has been awarded, section 552.104 will generally not except information submitted with a bid or the contract itself from disclosure. Open Records Decision No. 514 (1988). Therefore, we conclude that the city may withhold the proposals relating to proposal request BC3-330 under section 552.104 only if the contract has not yet been awarded. If the contract has been awarded, they must be released.¹

Next, we consider whether the proposal submitted by HCFS, Inc. in response to proposal request BC2-259 is confidential. The contract for this proposal request has been awarded. You assert that this information is protected from required public disclosure under sections 552.101, 552.104, and 552.110 of the act. As noted above, section 552.104 does not generally protect information once a contract has been awarded. Section 252.049(b) of the Local Government Code provides that proposals are open for public inspection once a contract has been awarded, but that "trade secrets and confidential information" in the proposals are not open for public inspection. Similarly, section 552.110 of the act excepts "[a] trade secret or commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision." In order for information to be excepted from required public disclosure as "commercial or financial information," the information must be privileged or confidential under the common or statutory law of Texas. Open Records Decision No. 592 (1991). With the exception of the doctrine of trade secrets, neither you nor HCFS, Inc. suggest that the information is privileged or confidential under common law or statute. Therefore, we conclude that the proposal does not contain information that is "confidential information" under either section 242.049(b) of the Local Government Code or section 552.110 of the act.

Section 552.110 also protects trade secrets from required public disclosure. The Texas Supreme Court has adopted the definition of trade secret from the Restatement of Torts, section 757 (1939). *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958). A trade secret

may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives [one] an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. . . . A trade secret is a process or device for continuous use in the operation of

¹Of course, the proposals relating to proposal request BC3-330 must not be released to the extent they contain information, such as a trade secret, that is confidential. You have not provided us with a basis to conclude that any information in the proposals is confidential.

the business. Generally it relates to the production of goods, as for example, a machine or formula for the production of an article. It may, however, relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939). There are six factors listed by the Restatement which should be considered when determining whether information is a trade secret:

(1) the extent to which the information is known out side of [the company's] business; (2) the extent to which it is known by employees and others involved in [the company's] business; (3) the extent of measures taken by [the company] to guard the secrecy of the information; (4) the value of the information to [the company] and to [its] competitors; (5) the amount of effort or money expended by [the company] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

Id. The governmental body or the company whose records are at issue must make a prima facie case for exception as a trade secret under section 552.110. See Open Records Decision No. 552 (1990) at 5.

HCFS, Inc. contends that the following sections of its proposal constitute a trade secret: section 3.2, sections 3.2.1-4, section 3.3.2, attachments 1-4, attachments 7A, 7B and 7C, and attachments 10-18. It makes the following showing:

The information contained in the HCFS proposal sets forth the processes, forms and reports which HCFS designed for use in its business and which gives HCFS an advantage over competitors who do not know or use them. This information is unique to HCFS and is not known outside of its business. HCFS protects this information as trade secrets by having its employees sign agreements agreeing not to disclose any of the information to people or companies outside of HCFS. This information is the very heart of HCFS' operations and would be very valuable to its competitors. HCFS has spent the last seven years developing and perfecting its reports, processes and forms through hard work, research, and feedback from its clients. This information could only be acquired or duplicated by others by expending the same time, energy and expertise as HCFS did in developing them.

We conclude that HCFS, Inc. has established a prima facie case that the foregoing portions of its proposal constitute trade secrets. Its assertions have not been rebutted as a matter of law. *See* Open Records Decision No. 552 at 5. Therefore, this information must be withheld under section 552.110 of the act.

If you have questions about this ruling, please contact our office.

Yours very truly,

A handwritten signature in black ink, appearing to read "Mary R. Crouter". The signature is fluid and cursive, with the first name "Mary" being the most prominent part.

Mary R. Crouter
Assistant Attorney General
Open Government Section

MRC/SLG/rho

Ref.: ID# 24749

Enclosures: Submitted documents

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